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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

YVONNE ANDRADE, Plaintiff and Appellant, v. CITY OF MILPITAS, Defendant and Respondent.	H037124 (Santa Clara County Super. Ct. No. CV157608)

Plaintiff Yvonne Andrade brought an action against defendant City of Milpitas (City) for failure to accommodate her disability. Andrade appeals from a judgment entered after the trial court granted the City's motion for summary judgment. We find no error and affirm.

I. Procedural and Factual Background

A. Complaint

In November 2009, Andrade filed a complaint for failure to accommodate disability and retaliation.[1] The complaint alleged: Andrade began working for the City in August 2000 as an office specialist; though she suffered from physical impairments,

[1] Andrade does not challenge the trial court's ruling regarding the retaliation cause of action.

she could perform her job with reasonable accommodation; the City failed to reasonably accommodate her impairment; and as a result of the City's failure to accommodate her disability, she suffered loss of wages and benefits as well as career opportunities.

B. Motion for Summary Judgment

The City brought a motion for summary judgment. The City argued that it reasonably accommodated Andrade's disability and there were no triable issues of material facts.

The City asserted that the evidence was undisputed as to the following material facts.[2] In August 2000, Andrade became a permanent hourly paid employee for the City. Since that time, she has held the position of office specialist for the planning and neighborhood services department, which is located at city hall. Andrade attends planning commission meetings and drafts the minutes for the planning commission and the library commission. She also performs office administrative functions, including generating correspondence, completing forms and other documents for planners, and entering timesheet information into the payroll computer system. Andrade's job duties require her to be present in the office to assist other City personnel, to answer telephones, to file documents, to interact with other City employees, and to assist at public meetings.

In March or April 2008, Andrade was diagnosed with fibromyalgia. Andrade took a medical leave from July to October 2008. In October, her doctor released her to work for 40 hours a week, but placed partial work restrictions relating to lifting and other physical activities. Andrade agreed that the City accommodated these restrictions.

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[2] These facts were based on Andrade's deposition testimony and declarations by Jane Corpus, the accounting services manager, Carmen Valdez, the human resources director, James Lindsay, the planning and neighborhood services director, Michael Ogaz, the city attorney.

Though a physical therapist recommended in October 2008 that Andrade work part-time, Andrade never requested permission from the City to work less than 40 hours per week.

Andrade was hospitalized for a week in November 2008. She was also hospitalized in February 2009 when she was diagnosed with Addison's disease, arrhythmia, and arthritis. Medication controls the symptoms of her Addison's disease and her arrhythmia. Andrade periodically receives physical therapy for her arthritis. However, Andrade is in pain every day from fibromyalgia. Sometimes her pain is so severe that she is unable to function and is bedridden. In November 2008, she began taking pain medication. When Andrade was feeling "real, real bad," she took "medication to put [herself] to sleep" and stayed in bed until 3:00 or 4:00 p.m. When she woke up, she watched TV or looked at her e-mail. "It depends on how [she] feel[s], because [she] can't sit that long because [her] leg starts swelling up really bad."

Andrade used her leave time, including vacation time and sick leave, to enable her to be paid when she did not come to work and she also took leave without pay. In 2009, Andrade took 341.25 hours of leave without pay. In 2010, she took 207.5 hours of leave without pay. Andrade was also allowed to make up missed time by working at lunch time or until 6:00 p.m. No one at the City was critical or complained about her missing work and taking leave without pay or denied her the ability to go home when she did not feel well.

In November or December 2008, Andrade spoke to Lindsay, her supervisor, and asked to work from home when she was not feeling well. She told him that this arrangement would vary from two to four hours a week. He told her that she could occasionally work from home on a limited basis.

In June 2009, Lindsay sent Andrade a letter after meeting with her and her attorney regarding her request to perform various duties at home. Lindsay noted that the City had been accommodating her by allowing her an "extremely flexible schedule," in which she can "come and go from work as needed . . . with no questions asked and no

formal schedule[],” and that her “work load had also been adjusted to ensure [her] flexible schedule [could] be accommodated, although this is with some difficulty and impacts to the Department.” He also stated that he would make an “additional accommodation of allowing [her] to complete the Planning Commission minutes from home whenever that work [was] available to be done.” The transcription of the planning commission minutes takes from 45 minutes to four days. Andrade attends the planning commission meetings and takes notes. She then accesses the videos of the meetings, which are available on the City’s public Web site and transcribes the minutes. However, Andrade failed to use the accommodation to work from home.

In August 2010, the City also allowed Andrade to transcribe minutes from the library advisory commission and the bicycle and pedestrian advisory commission at home. Another employee attends the library commission meetings, records them, and gives the tapes to Andrade. Andrade then transcribes the minutes from the tapes.

The memorandum of understanding (MOU) between the City and Andrade’s union states that vacation is scheduled in advance at the beginning of each year. In order for Andrade to be paid instead of having to take leave without pay, the City permitted Andrade to call her supervisor the day she was too ill to work and use vacation time. The MOU also requires permanent employees with a non-work-related injury or medical condition who have exhausted their sick leave to request a leave of absence without pay with a doctor’s certificate. The City granted Andrade leave without pay for her medical condition without requiring a doctor’s certificate each time she was unable to work and she did not have any more sick leave. The MOU limits the amount of leave without pay that a department head can approve to 160 hours in a fiscal year, but the human resources director can grant a leave without pay up to one year upon written request of the employee. Andrade took 403.25 hours in fiscal year 2008/2009 and 256.75 hours in fiscal year 2009/2010 of leave without pay and was not required to submit a written request to the human resources director.

Andrade lives five minutes from city hall and often goes home during her lunch break to rest. Andrade never provided a doctor's recommendation to the City that she should work from home due to her medical condition.

C. Summary Judgment Opposition

Andrade filed opposition to the motion for summary judgment. She argued that the City failed to accommodate her medical condition because it refused to allow her to perform some of her duties from home. She also argued that the City failed to engage in the interactive process in a timely manner to determine effective reasonable accommodation.

Andrade submitted her declaration in which she stated that her job duties "rarely require her to interact with the public or with department employees in a face-to-face manner, aside from attending commission meetings," and that approximately 60 percent of her communications with other employees is conducted through office e-mail. Andrade also stated that approximately 75 percent of her job duties consisted of planning commission support, and that these and other "sub-committee support duties, aside from physically assembling and delivering the actual binders, can be performed at home with access to the City's computer network; however, the City has never arranged for computer access from [her] home. [She was] unable to perform any work from home, including the minutes, without access to the City's computer network."

Andrade further stated that Valdez asked her how she was feeling in December 2008. When Andrade said that she was not feeling well, Valdez told her she should go on long term disability. Shortly thereafter, when Lindsay told her that if she had a computer, she could work from home, Andrade said that she would consider it. A couple of days later, Andrade told Lindsay that she would like to work at home. Lindsay informed her that working from home was not an option.

Andrade disputed the statement that she used her leave time, including vacation time and comp time, to enable her to be paid when she was too ill to work and explained her need to work from home. "Having made adjustments to my medication dosage and to the disability itself, I am presently able to perform all of my job duties in a competent fashion after a brief rest period ranging from one to two hours per day when I am feeling particularly ill. It is especially difficult to wake up early in the morning due to the medication I take. I normally call in sick for an entire day when I suffer from pain to the extent that it is difficult to get out of bed in the morning, because my supervisor frowns upon calling in sick for a portion of the day. The nature of my Fibromyalgia symptoms renders my body extremely exhausted from constant pain. On bad days, after taking pain medication and resting for an hour or so, I am able to get up and resume my normal work pace. I am unable to take these extended rest periods at the office. However, if I was able to perform my job responsibilities from home on an as-needed basis, I would be able to rest at home before attending to the tasks needing completion." Andrade estimated that 75 percent of the hours that she is forced to take as vacation, sick leave, or leave without pay could be recouped if she was allowed to work from home.

Andrade also stated that she is forced to take the same schedule for breaks and lunch periods as other employees, and she has never been offered the opportunity to work past 6:00 p.m. In 2006 or 2007, she was told that it was against the City's policy to allow employees to work after 6:00 p.m. unless they were attending a meeting or other work function.

Andrade submitted an assessment made by her physical therapist in October 2008. It states that "pt will not be able to tolerate working 40hrs/wk. Recommend part time w/ rest periods ie 1/2 days, rest days in between." Andrade gave Valdez a copy of these recommendations.

D. The City's Reply

In its reply, the City submitted declarations by Corpus and Lindsay. Corpus's declaration states: "Permitting an hourly clerical employee to have network access at home poses increased security risk to the sensitive information maintained by the City. The City's payroll system contains private information about all City employees, including personal address and phone number, social security numbers, garnishments, and other confidential personal information. Out of all City employees, the City allows only the three administrators for the City's intranet computer program to access the computerized payroll system from home."

Lindsay's declaration states that he reallocated Andrade's duties to have her responsible for less time-sensitive tasks. He also stated that his duties include attending planning commission meetings. The City video records these meetings and posts the videos on the City's Web page.

The City also argued that Andrade's complaint did not allege a cause of action for failure to engage in the interactive process.

II. Discussion

A. Standard of Review

"Appellate review of a ruling on a summary judgment or summary adjudication motion is de novo." (*Brassinga v. City of Mountain View* (1998) 66 Cal.App.4th 195, 210.) In performing our independent review, we apply the same three-step process as the trial court. "Because summary judgment is defined by the material allegations in the pleadings, we first look to the pleadings to identify the elements of the causes of action for which relief is sought." (*Baptist v. Robinson* (2006) 143 Cal.App.4th 151, 159 (*Baptist*).)

"We then examine the moving party's motion, including the evidence offered in support of the motion." (*Baptist*, *supra*, 143 Cal.App.4th at p. 159.) When the defendant

moves for summary judgment, the defendant bears both the initial burden of production and the burden of persuasion. The "initial burden of production [requires the defendant] to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Id*. at p. 851.) The burden of persuasion requires the defendant to show that there are no triable issues of material fact and that the defendant is entitled to judgment as a matter of law. (*Id.* at p. 850.)

If the moving papers make a prima facie showing that justifies a judgment in the defendant's favor, the burden shifts to the plaintiff to make a prima facie showing of the existence of a triable issue of material fact. (Code Civ. Proc. § 437c, subd. (p)(2); *Aguilar*, *supra*, 25 Cal.4th at p. 849.)

In determining whether the parties have met their respective burdens, the court must "'consider all of the evidence' and 'all' of the 'inferences' reasonably drawn therefrom [citation], and must view such evidence [citations] and such inferences [citations], in the light most favorable to the opposing party." (*Aguilar*, *supra*, 25 Cal.4th at p. 843.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Id.* at p. 850.)

B. Failure to Accommodate

The California Fair Employment and Housing Act (FEHA) (Gov. Code § 12900 et seq.)[3] imposes liability against an employer for "fail[ing] to make reasonable

[3] All further statutory references are to the Government Code unless otherwise noted.

accommodation for the known physical . . . disability of an . . . employee." (§ 12940, subd. (m).) Section 12940, subdivision (m) requires a plaintiff to "establish that he or she suffers from a disability covered by FEHA and that he or she is a qualified individual" whose disability the employer failed to reasonably accommodate. (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 256.) An employer is required to accommodate only a "known" disability. (§ 12940, subd. (m).)

An employer is not required to choose the preferred accommodation or the one that the employee seeks. (*Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345, 370.) Rather, "'"the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the [one] that is easier for it to provide." [Citation.] As the Supreme Court has held . . . an employee cannot make his employer provide a specific accommodation if another reasonable accommodation is instead provided. [Citation.]' [Citations.]" (*Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 228.) Moreover, an employer is not required to make an accommodation that the employer demonstrates would "produce undue hardship." (§ 12940, subd. (m).)

Here, the undisputed evidence was that Andrade requested that she be allowed to work from home for two to four hours per week depending on her health and ability to work. The City agreed that Andrade could transcribe the minutes of the planning commission at home. The City subsequently agreed that she could transcribe the library advisory commission and bicycle and pedestrian advisory commission minutes at home. Andrade testified that transcribing the planning commission minutes could take from 45 minutes to four days depending on the length of the meeting. Thus, the City offered a reasonable accommodation for Andrade's disability.

Andrade argues that it is undisputed that the City never provided her with the necessary network access, and thus she was unable to work from home. However, Andrade testified that she transcribes the library commission minutes from tapes brought

to her by another employee. Andrade also testified that she transcribes the planning commission meetings after she accesses the videos of the meetings that are available on the City's public Web site. Thus, it is unnecessary for Andrade to access the City's secure internal server system in order to transcribe the minutes from home.

The City also reasonably accommodated Andrade's medical condition by allowing her to take vacation time that had not been scheduled in advance and unpaid time off without a doctor's certificate. In addition, she was not required to submit a written request to the human resources director. These measures enabled Andrade to more easily take time off when necessary, and avoid losing her full-time employment.

Andrade contends, however, that granting unlimited unpaid time off does not constitute a reasonable accommodation. "'[A] reasonable accommodation can include providing the employee accrued paid leave or additional unpaid leave for treatment . . .' provided it is likely that, at the end of such leave, the employee will be able to perform his or her employment duties." (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1193-1194, quoting *Hanson v. Lucky Stores, Inc.*, *supra*, 74 Cal.App.4th at p. 226.) Andrade argues that fibromyalgia is incurable and thus restructuring her job so that it could be performed from home was the only reasonable accommodation. She further points out that this accommodation could not cause undue hardship to the City because the City was able to accommodate her absence of approximately five and a half hours per week during 2009 and 2010, which was "very close to the hours that [she] sought as a work-from-home accommodation in November/December 2008." There is no merit to Andrade's contention. As previously discussed, the City offered Andrade the reasonable accommodation of transcribing minutes for the planning and library advisory commissions meetings from home, and she has failed to use this accommodation.

C. Failure to Engage in Interactive Process

Andrade also contends that the City failed to discharge its initial burden of establishing a prima facie case that it had engaged in good faith in the interactive process. Andrade claims that "[o]ne of the fundamental errors the trial court made is it failed to understand that under the FEHA, the 'interactive process' is part and parcel of the duty an employer has to reasonably accommodate an employee's disability."

The requirement of a good faith, interactive process is set forth in section 12940, subdivision (n): "It shall be an unlawful employment practice, unless based upon a bona fide occupation qualification, . . . [¶] . . . [¶] (n) For an employer . . . to fail to engage in timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition." However, the failure to engage in the interactive process and failure to accommodate claims "involve separate causes of action and proof of different facts." (*Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424.) An employer's failure to engage in the good faith, interactive process required by section 12940, subdivision (n) is "a separate FEHA violation independent from an employer's failure to provide reasonable disability accommodation . . . ." (*Ibid.*)

Here, the complaint did not allege a cause of action for failure to engage in the interactive process. Since our review is governed by the pleadings, Andrade's factual allegations regarding any failure to engage in an interactive process cannot raise any triable issues as to the accommodation cause of action. (*Baptist, supra*, 143 Cal.App.4th at p. 159.)

Andrade next argues that the trial court erred when it denied her request to amend her complaint to add a failure to engage in the interactive process cause of action. We disagree.

In her brief in opposition to the motion for summary judgment, Andrade did not request leave to amend her complaint. At the hearing on the motion, Andrade's counsel argued that "even if the interactive process is not set out as a separate cause of action it is framed by the pleadings because it's part of Count 1, the failure to accommodate and the court should exercise its discretion and treat this as a motion for judgment on the pleadings and allow amendment to that effect, but I don't think we even get to that point anyway."

As explained in *Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654: "'"[A] *defendant's* motion for summary judgment 'necessarily includes a test of the sufficiency of the complaint . . . .' Motions for summary judgment in such situations [*sic*] have otherwise been allowed as being in legal effect motions for judgment on the pleadings. [Citations.]" [Citation.] "'Thus, if the reviewing court finds the complaint fails to state facts sufficient to constitute a cause of action as a matter of law, it need not reach the question whether plaintiff's opposition to the summary judgment motion raises a triable issue of fact.'" [Citation.]' [Citation.] [¶] However, if summary judgment is granted on the ground that the complaint is legally insufficient, but it appears from the materials submitted in opposition to the motion that the plaintiff could state a cause of action, the trial court should give the plaintiff an opportunity to amend the complaint before entry of judgment. [Citations.] [¶] Even where the complaint does present a cognizable claim, so that the court proceeds to the second or third step, the pleadings remain significant. Summary judgment cannot be granted on a ground not raised by the pleadings. [Citations.] Conversely, summary judgment cannot be *denied* on a ground not raised by the pleadings. [Citations.]" (*Id.* at pp. 1662-1663.)

Here, the City did not argue in its motion for summary judgment that Andrade's complaint was legally insufficient as to a cause of action for failure to engage in the interactive process, and thus its motion did not operate as a motion for judgment on the pleadings. In opposing the motion, Andrade presented facts to support a cause of action

that was not alleged in her complaint. However, she never requested leave in her opposition to allege a new theory of liability, and thus there was no error by the trial court in granting the summary judgment motion based on the pleadings.

III. Disposition

The judgment is affirmed.

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Mihara, J.

WE CONCUR:

_____
Premo, Acting P. J.

_____
Duffy, J.*

* Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.